

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-4137

To be argued by
STANLEY SCHAIR

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETITIONER'S REPLY BRIEF

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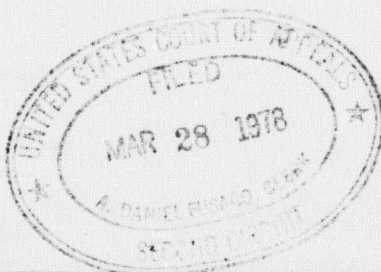


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The Commission's decision in this case may be sustained only if the term "platform" can be interpretatively stretched beyond any limits previously set by any court and out of all resemblance to fair notice to employers of what is intended by its use.

It takes a "strained and unnatural construction" of the OSHA standards to hold, as here and elsewhere urged by the Secretary, that the top of a piece of equipment under repair somehow becomes a work platform subject to OSHA's guardrail requirements simply because it occasionally is used as a working space in the sense that the repair work is performed thereon. So concluded the Administrative Law Judge and the Commission itself in *Arizona*

Public Co.,* an earlier case almost on all fours with the one at bar, wherein the Secretary's novel argument that the top of a transformer under repair is a work platform was rejected.

Although inconsistent with his attempts here and in earlier cases to expand the definition of the term "platform", as defined in 29 C.F.R. §1910.21(a)(4), the Secretary in his brief is forced to admit that the standard as written is concerned *solely* with elevated working spaces for the operation of machinery and equipment (R. Br. 10).** The top of the bake oven here involved, like the transformer top in *Arizona Public Co.*, is neither designed nor used as a working space for the operation of the equipment it encloses or of any other machinery or equipment. To the contrary, as found by the ALJ, the top of the bake oven was designed solely to enclose the oven and to house its motors (244a).

The ALJ below expressly recognized the *reasonableness* of interpreting the platform standards

to apply only to elevated work spaces . . . which are designed primarily for the operation of machinery and equipment and which require employee presence on a predictable and regular basis; and not to spaces where only occasional maintenance and repair work is performed. [243a-44a]

* OSHRC Docket No. 329, CCH 1971-1973 OSHD ¶15131 (1972), *aff'd*, CCH 1973-1974 OSHD ¶16800 (1973). See discussion in GE's main brief at 12-13.

** Reference is to the brief of Respondent Secretary of Labor on this appeal. GE's main brief shall hereafter be referred to as "Co. Br."

He nevertheless felt "constrained" to hold—albeit reluctantly and under compulsion of what he mistakenly regarded as a controlling Commission precedent—that the top of the bake oven is a work platform requiring the erection of guardrails around its perimeter (243a-44a).

Thus, relying solely on the Commission's earlier decision in *General Electric (1)* (discussed at Co. Br. 4-5, 14-15), the ALJ noted that the Commission had given "the broadest possible meaning to the term 'platform'", one that "suggests that an elevated area on *any structure** constitutes a platform whenever work is required to be performed thereon", regardless of the frequency of the work or the nature of the structure on which it is performed (244a).

The Secretary's brief does not (nor could it) dispute the catch-all and undifferentiating quality of this interpretation. Nor does it even make mention of the fact that the Commission itself has not followed it. Yet it asks this Court to adopt the interpretation as its own and to affirm the citation below on the grounds that (1) the Commission has "consistently" and "repeatedly" found such areas as the top of bake ovens to be platforms (R. Br. 10-11), (2) the interpretation is reasonable and sufficiently definite to be enforceable (R. Br. 8, 12-14) and (3) "any other reading of the standard would simply deny employees protection" (R. Br. 10).

None of these grounds is supportable and this reply brief will be limited to exposing the fallacies underlying each of them.

1. *To date no court has adopted the Secretary's overbroad interpretation of his platform guarding standards and, indeed, several have rejected it.* (See cases discussed

* Emphasis supplied.

at Co. Br. 22-23 wherein the Fifth and Seventh Circuits have refused to accept the Secretary's contention that a flat roof upon which employees are required to work is an open-sided floor or platform requiring guarding.)

The Commission itself has been unable in its recent decisions to find a majority among the current members who are willing to follow the construction of the platform guarding standards contained in *General Electric (1)*.^{*} (See discussion and cases cited at Co. Br. 15-17.) That the construction no longer is accorded any precedential value by the Commission was recognized by OSHA Administrative Law Judge Weil in a recent GE case^{**} involving the same type of structure (a stator frame) as was involved in *General Electric (1)*. Although urged by the Secretary to follow *General Electric (1)* on the ground of *stare decisis*, ALJ Weil refused to do so for the following reasons, all equally applicable to the case at bar:

[I]n the earlier *General Electric [1]* case, the Commission in 1975 held in an opinion by Commissioner Cleary that a stator frame is a work platform when it is being used as a place to stand on in performing part of the process of manufacture, a position vigorously dissented from by Commissioner VanNamee. In *Secretary v. Allis-Chalmers Corp.*, 4 BNA 1227 (1976), the Commission held that the top of a transformer in the course of manufacture was not a "platform" within the meaning of §23(c)(1), Commissioner Moran rea-

^{*} Of the current members only Commissioner Cleary who authored the opinion in *General Electric (1)* still adheres to its holding.

^{**} *General Electric Co.*, OSHRC Docket No. 76-3524, CCH 1977-1978 OSHD ¶22376 (1977).

soning that the term "platform" means "a structure that is erected to accomplish work that is being performed." Commissioner Barnako concurred on the ground that "the surface of a product being manufactured is not a 'platform' within the meaning of the cited standard," while not joining in Commissioner Moran's definition of "platform"; and Commissioner Cleary dissented on the rationale of his opinion in *General Electric*. The key to the problem is not in §23(c)(1) but in §21(a)(4), which defines "platform" for the purpose of §23(c) as "A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery." *Clearly the main portion of the housing of a generator or motor, temporarily positioned for ease of further manufacture in the position of a cylinder rising from the ground, is not essentially a working space—Commissioners VanNamee and Moran demonstrate that—and the need to interpret §23(c)(1) in such a way as to give effect to the overall purpose of the Act does not require that §23(c)(1) be given the meaning which was ascribed to it by Commissioner Cleary in the first General Electric case especially since, as Commissioner Barnako pointed out, §28(a) affords worker protection in the type of activity in question. It is much more reasonable to achieve worker protection to a man working on top of a stator frame or on the wing or tail assembly of a large airplane by wheeling up a scaffold with proper railings than by requiring the employer to build on the stator frame or on the airplane wing a standard railing; and one must hesitate long before needlessly interpreting a standard in a manner which might render it invalid as arbitrary and capricious.*

The flange in the strator frame on which Criscone was standing was not a "platform" within the meaning of §23(c)(1). Accordingly, Citation No. 2 is vacated and so much of the complaint as refers to it is dismissed. [Footnote omitted; emphasis supplied]

The Commission's opinions in *Arizona Public Co.*, *supra*, and in *Allis-Chalmers Corp.* (cited by ALJ Weil in the portion of his decision quoted above and discussed at Co. Br. 15-16) in themselves refute the Secretary's claim that the Commission has "consistently" and "repeatedly" found areas to be platforms "in both identical and substantially similar circumstances" (R. Br. 10). Indeed the sharp division on this subject which exists between the two present commissioners,* their inability to agree on the applicability of the term "platform" in situations analogous to the one at bar and the confusion resulting from their disagreement and the inconsistency of their decisions, is aptly illustrated by one of the Commission's most recent decisions on this subject, *Simmons, Inc.*, OSHRC Docket No. 12862, CCH 1977-1978 OSHD ¶22387 (1977), *aff'g without precedent*, CCH 1975-1976 OSHD ¶20678 (1976).

In *Simmons* an employee was required to work at the top of a Garnett machine at least two or three times a week** to clean out the machine's sifter at a height of 17 feet above ground level. A violation of the platform guarding requirements of § 1910.23(c) was found by the administrative law judge because the employer failed to guard all open sides of the sifter. On review by the Commission, the two cur-

* Commissioner Moran is no longer with the Commission and the nominee to succeed him has not yet been confirmed by the Senate.

** In contrast to the approximately two or three times a year in the case at bar.

rent commissioners were unable to agree on the merits of the violation; Chairman Cleary voted to affirm, relying on his earlier opinion in *General Electric (1)*, while Commissioner Barnako offered a different view:

With regard to the § 1910.23(c) violation, he [Commissioner Barnako] notes that not every surface on which an employee may stand while working is a platform within the meaning of the standard. See *Whirlpool Corp.*, 77 OSAHRC 36/C11, 5 BNA OSHC 1173, 1977-78 CCH OSHD ¶21,658 (No. 9224, 1977); *Allis-Chalmers Corp.*, 75 OSAHRC 86/F5, 3 BNA OSHC 1629, 1975-76 CCH OSHD ¶20,065 (No. 5599 1975), *aff'd*, 542 F.2d 27 (7th Cir. 1976) [top of a rotary kiln on which employees worked not a platform]. *Here, the alleged platform was part of the surface of a machine, not a "balcony or platform for the operation of machinery and equipment," of which the standard speaks.* [Emphasis supplied; CCH 1977-1978 OSHD ¶22387 at pp. 26988-89]

This language and reasoning if applied to the bake oven in this case would, we submit, require that the citation be vacated.

The commissioners were similarly divided in *Prowler Travel Trailers of New York, Inc.*, OSHRC Docket No. 15636, CCH 1977-1978 OSHD ¶22397 (1977), *aff'g without precedent*, CCH 1976-1977 OSHD ¶20712 (1976), wherein the administrative law judge found, and Commissioner Barnako affirmed, that two spanners 53 inches above the floor, resting on two parallel fixed runways and used in the construction of trailers, were not platforms requiring guardrails under § 1910.23(c). Chairman Cleary, once again relying on his opinion in *General Electric (1)*, would re-

verse because the spanners were "regularly used to do work that was a constant part of the assembly of trailers."*

The Commission and court decisions discussed in this subdivision of petitioner's Reply Brief, as well as those discussed in its main brief (at pp. 12-19), illustrate strong resistance to the catch-all definition of platform which the Secretary seeks to apply here. It is neither reasonable nor necessary to encompass within the term "platform" either roofs, structures in the process of manufacture (*e.g.*, stator frames, turbine shells, airplane wing or tail assemblies and transformers) or machines or equipment designed for other purposes (*e.g.*, transformer, sifting machine and bake oven).** For none of these is designed or intended essentially as a working space for the operation of machinery or equipment.

* Implied in Chairman Cleary's choice of words, and contrary to the Secretary's argument at R. Br. 10, is the notion that frequency of use may be a relevant factor in determining whether a structure is a platform. The top of the bake oven in the case at bar is only occasionally and infrequently used (235a, 244a).

** The only three cases, other than *General Electric (1)*, cited by the Secretary in his brief (R. Br. 10) to support his all-purpose application of the platform guarding requirement are readily distinguishable. All involved structures erected to serve as work platforms upon which employees were expected to work on a frequent and regular basis; none involved the top of a machine or piece of equipment. The issues in those cases differed markedly from that herein. In *U.S. Homes* the dispute was whether the structure there, admittedly a work platform, was a permanent work platform or a temporary scaffold. In *George A. Hormel*, there too was no dispute that the hog shaving platform was a work platform; at issue was the question whether the installation of guardrails would result in a greater hazard than their continued absence. And in *Sibley Mill* the dispute again did not touch upon the issue of what is a platform (involved was a catwalk upon which employees had to work at least 24 times each week), but on whether the employer had provided the equivalent of a standard guardrail.

2. Although conceding that the OSHA standard here in question may not be a "‘model of perfect precision’" * (R. Br. 12), the Secretary pleads that this Court pronounce it as sufficiently clear and definite to be enforceable as applied here because "the regulation appears to have been drafted with as much exactitude as possible in light of the myriad conceivable situations which could arise and which would be capable of causing injury" (*Ibid.*). To the contrary, this Court remarked in *General Electric* (1) that the "Byzantine pattern of OSHA standards" concerning the railing of platforms and scaffolds leaves "room for increased clarity of definition." 540 F.2d 67, 70 n.2 (1976).

The Secretary's overbroad interpretation of OSHA's ladder standards has invited similar criticism by the Tenth Circuit in its recent opinion in *Usery v. Kennecott Copper Corp.*, — F.2d —, No. 76-1735, Dec. 23, 1977 (10th Cir.). The court in rejecting the Secretary's interpretation stated:

... Kennecott was not required to assume the burden of guessing what the Secretary intended plain and unambiguous words employed in the safety regulations to mean. This is especially true when violation of a regulation subjects one to criminal or civil sanctions. A regulation cannot be construed to mean what an agency intended but did not adequately express. If the Secretary were permitted to interpret regulations by employing the unusual meaning of words, employers would be deprived of fair notice of that which is expected of them in violation of their due process rights.

* Quoting the Fifth Circuit in *Ryder Truck* which involved a different OSHA standard from that here at issue.

In *Diamond Roofing, supra** this concern was succinctly expressed:

"An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." [Citations omitted; Slip Opinion pp. 11-12]

There is no evidence in the record below that a reasonably prudent employer in the small AC motor industry would recognize that standard guardrails should be constructed around the perimeter of the top of a bake oven, or of any other piece of machinery or equipment, merely because employees may occasionally be required to go up there to repair and do maintenance work on motors there housed.** Such recognition could only come, we submit, from an unusual and forced interpretation of the words of the regulation here involved. For the platform guardrail-ing standard, as here applied to a bake oven top, does not "provide a reasonably clear standard of culpability" or afford an employer "fair warning of the conduct it prohibits." And the existence of alternative means of safeguarding against accidents, possibly a scaffold—as suggested by ALJ Weil—or personal protective equipment, if appropriate, makes adoption of an arbitrary interpretation in the name of necessity unwarranted.

* 528 F.2d at 649. See Co. Br. 23.

** Cf. *Lehr Construction Co.*, OSHRC Docket No. 7240, CCH 1977-1978 OSHD ¶22542, at pp. 27198-99 (1978).

CONCLUSION

For the foregoing reasons, the portion of the Commissioner's decision and order here under review should be set aside and the citation of violation therein upheld should be vacated.

Dated: New York, New York
March 27, 1978

Respectfully submitted,

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STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Norman Friedman, being duly sworn, deposes
and says, that on the 28th day of March 19 78 ~~XXXXXXXXXX~~

~~XXX~~ he served the annexed Petitioner's Reply Brief in RE: General
Electric Co. v. Occupational Safety & Health Review Comm.

upon 1. Carin A. Clauss, Solicitor of Labor
2. Allen Sachsel, Esq.

Esq(s) , Attorney(s)

for Respondent

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that being the address designated in the last papers served herein by
the said attorney.

Sworn to before me this 28th
day of March 19 78

Norman Friedman

John Alusick
JOHN ALUSICK
Notary Public, State of New York
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Qualified in New York County
Commission Expires March 30, 1980